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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

PTOL-90A (Rev. 04/07)

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on <u>02 June 2009</u>.
2a)☐ This action is **FINAL**.   2b)☒ This action is non-final.
3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) <u>39-76</u> is/are pending in the application.
    4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5)☐ Claim(s) _____ is/are allowed.
6)☒ Claim(s) <u>39-76</u> is/are rejected.
7)☐ Claim(s) _____ is/are objected to.
8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.
10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.
    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
    a)☐ All   b)☐ Some * c)☐ None of:
       1.☐ Certified copies of the priority documents have been received.
       2.☐ Certified copies of the priority documents have been received in Application No. _____.
       3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)
1)☒ Notice of References Cited (PTO-892)
2)☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3)☐ Information Disclosure Statement(s) (PTO/SB/08)
    Paper No(s)/Mail Date _____.
4)☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____ .
5)☐ Notice of Informal Patent Application
6)☐ Other: _____.

DETAILED ACTION

Notice to Applicant

1.   A request for continued examination under 37 CFR 1.114, including the fee set forth in

37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible

for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been

timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR

1.114. Applicant's submission filed on 2 June 2009 has been entered.

2.   This communication is in response to the Request for Continued Examination and

response filed on 2 June 2009. Claims 1-38 have been previously cancelled. Claims 39-76

remain pending.

Claim Objections

3.   Claim 76 is objected to because of the following informalities: claim 76 recites in the

preamble "[a] program storage device readable by machine for tangibly embodying a program of

instructions … [...] ..."   It appears that the program storage device is recited functionally as

merely intended use. For the purpose of applying art, Examiner assumes the preamble to read

"[a] program storage device readable by machine for tangibly embodying … [...] ... "

Appropriate correction is required.

Claim Rejections - 35 USC § 101

4.   35 U.S.C. § 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

5.   Claims 39-61 are rejected under 35 U.S.C. §101.

A)   As per claims 39-61, these appear to be directed toward a method or process of facilitating food service management. Based on Supreme Court precedent, and recent Federal Circuit decisions, the Office's guidance to examiners is that a § 101 process must (1) be tied to another statutory class (such as a particular apparatus) or (2) transform underlying subject matter (such as an article or materials) to a different state or thing. *Diamond v. Diehr,* 450 U.S. 175, 184 (1981); *Parker v. Flook,* 437 U.S. 584, 588 n.9 (1978); *Gottschalk v. Benson,* 409 U.S. 63, 70 (1972); *Cochrane v. Deener,* 94 U.S. 780,787-88 (1876).

An example of a method claim that would not qualify as a statutory process would be a claim that recited purely mental steps. Thus, to qualify as a § 101 statutory process, the claim should positively recite the other statutory class (the thing or product) to which it is tied, for example by identifying the apparatus that accomplishes the method steps, or positively recite the subject matter that is being transformed, for example by identifying the material that is being changed to a different state.

In the instant application, Appellant's method steps fail the first prong of the new Federal Circuit decision since they are not required to be tied to another statutory class and can be

performed without the use of a particular apparatus. In particular, Applicant's claims do not

recite <u>who or what</u> is performing the method steps. Furthermore, the method steps fail to

unambiguously require transformation of underlying subject matter to a different state or thing.

The mere manipulation and production of non-functional descriptive material (i.e., a "menu set")

is not a transformation because a menu set is not statutory subject matter. Dependent claims 40-

61 merely add further details of the process recited in claim 39 without including any tie to

another statutory category nor any transformation of subject matter into a different state or thing.

Thus, claims 39-61 are non-statutory since they are not requisitely tied to another statutory class

and they do not requisitely transform underlying subject matter to a different state or thing.

Claim Rejections - 35 USC § 112

6.   The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making
> and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it
> pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode
> contemplated by the inventor of carrying out his invention.

7.   Claims 39-76 are rejected under 35 U.S.C. 112, first paragraph, as containing subject

matter which was not described in the specification in such a way as to reasonably convey to one

skilled in the relevant art that the inventor(s), at the time the application was filed, had

possession of the claimed invention.

(A)   Newly amended claims 39, 62, and 76 recite limitations that are new matter, and are therefore rejected. The added material which is not supported by the original disclosure is as follows:

- "establishing a preselected nutritional criteria," as disclosed at lines 10, 15, 11, respectively.

35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. "New matter" constitutes any material which meets the following criteria:

a) It is added to the disclosure (either the specification, the claims, or the drawings) after the filing date of the application, and

b) It contains new information which is neither included nor implied in the original version of the disclosure. This includes the addition of physical properties, new uses, etc.

In particular, the Examiner was unable able to find any support for this newly added language within the specification as originally filed on 14 March 2001. Applicant is respectfully requested to clarify the above issues and to specifically point out support for the newly added limitations in the originally filed specification and claims.

(B)   Claims 40-61, 63-75 incorporate the features of independent claims 39 and 62, through dependency, and are also rejected.

Applicant is required to cancel the new matter in the reply to this Office Action.

8.   If Applicant continues to prosecute the application, revision of the specification and claims to present the application in proper form is required. <u>While an application can, be</u>

amended to make it clearly understandable, no subject matter can be added that was not

disclosed in the application as originally filed on 14 March 2001.

9.   Newly amended claim 76 is rejected under 35 U.S.C. 112, first paragraph, as failing to

comply with the enablement requirement. The claim(s) contains subject matter which was not

described in the specification in such a way as to enable one skilled in the art to which it pertains,

or with which it is most nearly connected, to make and/or use the invention. Claim 76 recites "a

program storage device readable by machine for tangibly embodying a program of instructions

executable by said machine to perform a method of facilitating food service management … [...]

... said method comprising the steps of : providing a computer-based system … [...] ... " It is not

evident how a program running on a computer provides a computer-based system. The

specification does not enable any person skilled in the art to which it pertains, or with which it is

most nearly connected, to use the invention commensurate in scope with this claim.

10.   The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

11.   Claims 62-75 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for

failing to particularly point out and distinctly claim the subject matter which applicant regards as

the invention.

       (A)   Claim 62 recites limitations in "means plus function" language. The scope of a

"means" limitation is defined as the corresponding structure or material set forth in the written

description and equivalents thereof. See MPEP § 2181 through § 2186. If there is no disclosure

of structure, material or acts for performing the recited function in the specification, the claim

limitation lacks specificity, and fails to satisfy the requirements of 35 U.S.C. 112, second

paragraph.

Recent court cases have held that simply reciting "software" without providing some

detail about the means to accomplish the function is not enough. *See Aristocrat Techs. Austl. Pty*

v. Int'l Game Tech., __ F.3d __, 2008 U.S. App. LEXIS 6472, at *10 [86 USPQ2d 1235] (Fed.

Cir. Mar. 28, 2008) ("For a patentee to claim a means for performing a particular function and

then to disclose only a general purpose computer as the structure designed to perform that

function amounts to pure functional claiming. Because general purpose computers can be

programmed to perform very different tasks in very different ways, simply disclosing a computer

as the structure designated to perform a particular function does not limit the scope of the claim

to 'the corresponding structure, material, or acts' that perform the function, as required by

section 112 paragraph 6."). The Court in Aristocrat did not require a listing of source code or a

highly detailed description of the algorithm to be used to achieve the claimed functions in order

to satisfy 35 U.S.C. §112 paragraph 6. It did require, however, the disclosure of at least the

algorithm that transformed the general purpose microprocessor to a "special purpose computer

programmed to perform the disclosed algorithm." *WMS Gaming*, 184 F.3d at 1349. Thus the

patent must disclose, at least to the satisfaction of one of ordinary skill in the art, enough of an

algorithm or description of structure corresponding to the claimed function to provide the

necessary structure under 35 U.S.C. §112 paragraph 6.

In the instant case, the "means plus *function*" language recited in claim 62 lacks sufficient disclosed structure under 112, sixth paragraph, and is therefore indefinite under 112, second paragraph.

(B)   Claims 63-75 incorporate the features of claim 62, through dependency, and are also rejected. See *Ex parte Lyell*, 17 USPQ2d 1548 (Bd. Pat. App. & Inter. 1990).

Applicant is required to:

(a)   Amend the claim so that the claim limitation will no longer be a means (or step) plus function limitation under 35 U.S.C. 112, sixth paragraph; or

(b)   Amend the written description of the specification such that it expressly recites what structure, material, or acts perform the claimed function without introducing any new matter (35 U.S.C. 132(a)).

If applicant is of the opinion that the written description of the specification already implicitly or inherently discloses the corresponding structure, material, or acts so that one of ordinary skill in the art would recognize what structure, material, or acts perform the claimed function, applicant is required to clarify the record by either:

(a)   Amending the written description of the specification such that it expressly recites the corresponding structure, material, or acts for performing the claimed function and clearly links or associates the structure, material, or acts to the claimed function, without introducing any new matter (35 U.S.C. 132(a)); or

(b)   Stating on the record what the corresponding structure, material, or acts, which

are implicitly or inherently set forth in the written description of the specification, perform the

claimed function. For more information, see 37 CFR 1.75(d) and MPEP §§ 608.01(o) and 2181.

Claim Rejections - 35 USC § 103

12.   The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section
> 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the
> subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary
> skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the
> invention was made.

NOTE: The following rejections assume that the subject matter added in the 2 June 2009

amendment are NOT new matter, and are provided hereinbelow for Applicant's consideration,

on the condition that Applicant properly traverses the new matter objections and rejections made

in sections 5-7 above in the next communication sent in response to the present Office Action.

13.   Claims 39-40, 44-76 are rejected under 35 U.S.C. 103(a) as being unpatentable over

Kolawa et al., U.S. Patent Number 6, 370, 513 in view of Cosentino et al., U.S. Patent Number 6,

290, 646 and further in view of Petot, et al. article: "An artificial intelligence system for

computer-assisted menu planning," Sept. 1998, hereinafter known as Petot for substantially the

same reasons given in the previous Office Action (paper number 20090203). Further reasons

appear hereinbelow.

(A)   As per amended claim 39, Kolawa teaches a method for facilitating food service management, said method comprising the steps of:

providing a computer-based system (Kolawa; Figure 1 column 4, line 63 to column 5, line 13);

establishing a standard set of therapeutic diet types contained in a master diet type database in said system (Kolawa; column 7, lines 15-17, column 9, lines 15-21);

storing a plurality of food recipes in said system within a recipe database (Kolawa;) (Kolawa; Figure 15, column 7, lines 15-17, column 16, lines 32-34);

obtaining nutritional data on each food item used in said plurality of recipes and storing said data in said system within a food item database (Kolawa; Figures 26A TO 26D, column 16, line 63 to column 17, line 33);

analyzing (reads on "evaluating") "the chemical components in the specified foods" (reads on "a nutritional content of each food item") (Kolawa; Figures 26A to 26D, column 16, lines 29 to column 17, line 33, column 3, lines 25-31); Examiner interprets Kolawa's teachings of analysis of food products into "attributes" that include "protein," "total lipid (fat)," "carbohydrate (by difference)," "energy" (i.e. calories), "water" (i.e. moisture), "sugars, total," "fiber, total dietary," "calcium," iron," "magnesium," "phosphorus," "potassium," "sodium," and "zinc" (Kolawa; Figure 26A) to be a form of "evaluating a nutritional content of each food item;"

verifying a "chemical component" (reads on "a nutritional value") of each of said

plurality of recipes in said recipe database (Kolawa; Figure 15, Figure 17, column 3, lines 25-31,

column 16, lines 52-65, column 17, lines 10-33);

assigning various food attributes to said recipes based upon said verified nutritional

values (Kolawa; Figures 26A TO 26D, column 3, lines 27-31, column 16, lines 29-32);

making "chemical components" information (reads on "nutritional information associated

with said menu sets") available (Kolawa; Figure 15, Figure 17, Figure 26A, Figure 26B, column

3, lines 25-31, column 16, lines 52-65, column 17, lines 10-33); and

tracking an inventory of food items (Kolawa; Figure 11, column 13, lines 29-39).

Although Kolawa teaches making nutritional information associated with said menu sets

available, Kolawa fails to explicitly disclose a method comprising

providing a remote link to food service professionals associated with said healthcare

facility to access said system;

collecting information from said food service professionals; and

making nutritional information associated with said menu sets available to said food

service professionals.

However, the above features are well-known in the art, as evidenced by Cosentino.

In particular, Cosentino teaches a method including

making nutritional information available to said "nutritionists" (reads on "food service

professionals") (Cosentino; column 2, lines 25-62); Examiner interprets Cosentino's teachings

of a method "of monitoring and transmitting physiological and wellness parameters of

overweight/obese patients to a remote site where a weight management professional or

nutritionist evaluates such physiological and wellness parameters … [and] ... can supervise and

provide nutritional guidance to remotely located individuals" (Cosentino; column 2, lines 25-62)

and "[m]oreover, the apparatus allows the weight management professional to intervene and

adapt the individuals diet and exercise routine based on the weight and wellness information

received" and "communication to a medical professional caregiver, weight management

professional or nutritionist" (Cosentino; column 2, lines 59-62) to teach a form of making

nutritional information available to said "food service professionals;"

        providing a remote link to "nutritionists" (reads on "food service professionals")

associated with said healthcare facility to access said system (Cosentino; column 2, lines 56-62);

        collecting information from said food service professionals (Cosentino; column 2, lines

25-34, 56-62); and

        "adapt[ing] the individual's diet" (reads on "suggesting menu sets") to said food service

professionals (Cosentino; column 2, lines 25-34, 41-46, 56-62).

        It would have been obvious to one of ordinary skill in the art at the time the invention

was made to modify the method of Kolawa to include these limitations, as taught by Cosentino,

with the motivations of enabling the "monitoring and transmitting physiological and wellness

parameters of overweight/obese patients to a remote site where a weight management

professional or nutritionist evaluates such physiological and wellness parameters" and "can

supervise and provide nutritional guidance to remotely located individuals" (Cosentino; column

2, lines 48-54).

Although Kolawa teaches facilitating food service management and making nutritional information associated with said menu sets available, Kolawa fails to explicitly disclose a method comprising

facilitating food service management in a health care facility;

shaping menu sets of said recipes for each of said established therapeutic diet types in a menu database in said system based upon said assigned food attributes;

establishing preselected nutritional criteria; and

suggesting menu sets in accordance with said preselected nutritional criteria to said food service professionals.

However, the above features are well-known in the art, as evidenced by Petot.

In particular, Petot teaches a method including

facilitating food service management in a health care facility (Petot; page 1014, column 1, paragraph 2 to column 2, paragraph 1);

shaping menu sets of said recipes for each of said established therapeutic diet types in a menu database in said system based upon said assigned food attributes (Petot; Figure 1, page 1010, paragraph bridging columns 1- 2, page 1011, column 1, paragraphs 2-3);

establishing preselected "numeric constraints" reads on "nutritional criteria" (Petot; Figure 1, page 1010, paragraph bridging columns 1- 2, page 1011, column 1, paragraph 2); and

suggesting menu sets in accordance with said preselected nutritional criteria to said food service professionals (Petot; Figure 1, page 1010, paragraph bridging columns 1- 2, page 1011, column 1, paragraph 3, page 1014, column 1, paragraph 2 to column 2, paragraph 1); Examiner

interprets Petot's teachings of a system intended for use by a dietician (reads on "food service professional" (Petot; page 1010, paragraph bridging columns 1-2) and "a tool for planning daily menus in accordance with the nutrition needs ... [...] ... of individual clients ... [...] ..." (Petot; page 1014, column 1, paragraph 2) and " ... [...] ... a case base of menus ... [...] ... to meet ... [...] ... dietary prescriptions ... [...] ..." (Petot;, page 1014, paragraph bridging columns 1- 2) to teach a form of suggesting menu sets in accordance with said preselected nutritional criteria to said food service professionals.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the combined teachings of Kolawa and Cosentino to include these limitations, as taught by Petot, with the motivations of "planning daily menus in accordance with the nutrition needs and personal preferences of individual clients ... [...] ...could also apply to planning special-purpose menus for use in many different settings. For example, preplanned menus for metabolic diets in a clinical research center can become a case base, which can then be accessed for menus. Menus revised to meet specific research needs can be added to the case base for future protocols. A menu planner for [therapeutic] diabetic diets could be built by tuning the adaptation strategies to meet individual needs ... [...] ... could be adapted for use by institutions such as nursing homes, hospitals, schools and colleges, wellness and fitness centers, and nutrition education programs" (Petot; page 1014, column 1, paragraph 2 to column 2, paragraph 1).

(B)   As per claims 40-41, 44-49, Kolawa, Cosentino and Petot teach a method as analyzed and discussed in claim 39 above further comprising the steps of

categorizing said plurality of recipes according to geographic regions having noticeable

differences in food tastes (Kolawa; Figure 16, Figure 27, column 18, lines 5-7);

planning daily menus in accordance with "guidelines" and "standards" (reads on

"eliminating variances in said therapeutic diet types among differing health care facilities")

(Petot; Abstract, page 1011, column 1, paragraphs 3-4);

forming a large library of menu sets in said menu database (Kolawa; column 18, lines 24-

29);

allowing said "nutritionists" (reads on "food service professionals") to choose a set of

menus from said library (Cosentino; column 2, lines 25-34, 41-46, 56-62);

suggesting menu sets to said food service professionals based upon said inventory of food

items at said healthcare facility (Cosentino; column 2, lines 25-34, 41-46, 56-62), (Kolawa;

column 13, lines 29-39);

suggesting menu sets to said food service professionals based upon an individual patient's

preference (Cosentino; column 2, lines 25-62);

wherein said patient's preference is based upon said patient's particular food tastes

(Kolawa; column 4, lines 63-66); and

wherein said patient's preference is based upon said patient's religious beliefs (Kolawa;

column 7, lines 15-17); Examiner interprets "ethnicity" to be a form of "religious beliefs."

The motivations for combining the respective teachings of, Kolawa, Cosentino and Petot

are as given in the rejection of claim 39 above, and incorporated herein.

(C)   As per claims 50-58, Kolawa, Cosentino and Petot teach a method as analyzed

and discussed in claim 39 above further comprising the steps of

storing said information collected from said food service professionals in said system in a

user database. (Kolawa; Figure 2, column 4, line 63 to column 5, line 9, column 5, lines 45-52),

(Cosentino; column 12, lines 33-44);

wherein said stored information in said user database includes identifying information

(Kolawa; Figure 2, column 4, line 63 to column 5, line 9, column 5, lines 45-52), (Cosentino;

column 12, lines 33-44);

wherein said stored information in said user database includes "keeping track of the

needs and preferences of the user" (reads on "historical information on prior use of said system

by said food service professionals") (Kolawa; Abstract, column 10, lines 41-43);

further comprising the step of limiting access to said system to "medical professional

caregiver" (reads on "food service professionals") associated with a healthcare facility

(Cosentino; column 3, lines 41-45, column 4, lines 28-30); Examiner interprets Cosentino's

teachings of "a remote central office location" at which a "medical professional" caregiver

"monitors the patient's condition and provides medical treatment as may be necessary" to read

on "a healthcare facility;"

further comprising the step of authorizing at least one "medical professional caregiver"

(reads on "food service professionals") associated with a healthcare facility to receive

information (Kolawa; Figure 18, column 18, lines 1-5);

further comprising the step of allowing said food service professionals to place food item orders via said system (Kolawa; Figure 11, column 5, lines 25-27, column 13, lines 15-17, column 14, line 9);

further comprising the step of automatically updating said inventory to reflect said orders (Kolawa; Figure 11, column 13, lines 50-55);

wherein said food service professionals can place food item orders with a plurality of food item distributors (Kolawa; Figure 11, column 13, lines 50-55, column 19, lines 41-43); and

further comprising the step of providing a standard format for order transactions such that said food service professionals can make objective decisions about placing said orders (Kolawa; column 13, lines 15-25).

The motivations for combining the respective teachings of Kolawa, Cosentino and Petot are as given in the rejection of claim 39 above, and incorporated herein.

(D) As per claims 59-61, Kolawa, Cosentino and Petot teach a method as analyzed and discussed in claim 39 above further comprising the steps of

providing said food service professionals the ability to "communicate" (reads on "interact") with a system proprietor (Cosentino; column 2, lines 56-62, column 3, lines 4-7);

providing said food service professionals the ability to "communicate" (reads on "interact") with other food service professionals associated with other healthcare facilities (Cosentino; column 2, lines 56-62, column 3, lines 4-7); and

providing a search engine such that said food service professionals can search said databases (Kolawa; column 17, lines 9-23, 57-62).

The motivations for combining the respective teachings of Kolawa, Cosentino and Petot are as given in the rejection of claim 39 above, and incorporated herein.

(E)   Amended claim 62 differs from amended method claim 39 in that it is a system rather than a method for facilitating food service management in a health care facility.

System claims 62-75 repeat the subject matter of claims 39, 40, 44-47, 50, 53-57, 60-61, respectively, as a set of elements rather than a series of steps. As the underlying processes of claims 39, 40, 44-47, 50, 53-57, 60-61 have been shown to be fully disclosed by the collective teachings of Kolawa, Cosentino and Petot in the above rejection of claims 39, 40, 44-47, 50, 53-57, 60-61, it is readily apparent that the system disclosed collectively by Kolawa, Cosentino and Petot includes the apparatus to perform these functions. As such, these limitations are rejected for the same reasons given above for method claims 39, 40, 44-47, 50, 53-57, 60-61, and incorporated herein.

The motivations for combining the respective teachings of Kolawa, Cosentino and Petot are as given in the rejection of claim 39 above, and incorporated herein.

(F)   Amended claim 76 differs from amended method claim 39 by reciting a "program storage device readable by machine for tangibly embodying ..." in the preamble. As per this limitation, Kolawa clearly discloses his invention to be implemented on a "program storage device readable by machine for tangibly embodying ... " (Kolawa; column 4, line 62 to column 5, line 9). The remainder of claim 76 repeats the limitations of claim 39, and is therefore rejected for the same reasons given above for claim 39.

The motivations for combining the respective teachings of Kolawa, Cosentino and Petot are as given in the rejection of claim 39 above, and incorporated herein.

14.   Claims 42-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kolawa et al., U.S. Patent Number 6, 370, 513 in view of Cosentino et al., U.S. Patent Number 6, 290, 646 and Petot, et al. article: "An artificial intelligence system for computer-assisted menu planning," Sept. 1998, hereinafter known as Petot, as applied to claim 39 above, and further in view of Brown, U.S. Patent Number 6, 168, 563, for substantially the same reasons given in the previous Office Action (paper number 20080711). Further reasons appear hereinbelow.

(A)   As per claims 42-43, Kolawa, Cosentino and Petot teach a system as analyzed and discussed in claim 39 above.

Although Kolawa, Cosentino and Petot teach modifying menus for diabetic diets (Kolawa; column 9, lines 15-21), Kolawa, Cosentino and Petot fail to explicitly disclose a method

further comprising the step of evaluating diabetic exchange rates of each food item;

wherein said verification of nutritional value of each of said plurality of recipes is based upon said evaluation of nutritional content and said evaluation of diabetic exchange rates of each food item.

However, the above features are well-known in the art, as evidenced by Brown.

In particular, Brown teaches a method

. further comprising the step of evaluating diabetic exchange rates of each food item (Brown; column 21, lines 32-53, column 22, lines 44-55);

wherein said verification of nutritional value of each of said plurality of recipes is based upon said evaluation of nutritional content and said evaluation of diabetic exchange rates of each food item (Brown; column 21, lines 32-53, column 22, lines 44-55).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the combined teachings of Kolawa, Cosentino and Petot to include these limitations, as taught by Brown, with the motivations of "providing a simple and inexpensive system for remotely monitoring patients and for communicating information to the patients" and to "provide reliable information that allows a diabetic and his or her healthcare professional to establish, monitor and adjust a treatment plan (diet, exercise, and medication)" (Brown; column 5, line 66 to column 6, line 2, column 1, lines 54-56).

The motivations for combining the respective teachings of Kolawa, Cosentino and Petot are as given in the rejection of claim 39 above, and incorporated herein.

Response to Arguments

15.   Applicant's arguments filed 2 June 2009 have been fully considered but they are not persuasive. Applicant's arguments will be addressed hereinbelow in the order in which they appear in the response filed 2 June 2009.

(A)   At pages 11-16 of the 2 June 2009 response, Applicant argues that the limitations of claims 39-76 are not taught or suggested by the applied references. In response, all of the

limitations, including the newly added limitations, which Applicant disputes are missing in the

applied references have been fully addressed by the Examiner as either being fully disclosed or

obvious in view of the combined teachings of Kolawa, Cosentino, Petot and Brown, based on the

logic and sound scientific reasoning of one ordinarily skilled in the art at the time of the

invention, as detailed in the 35 USC § 103 rejections given in the preceding sections of the

present Office Action. In particular, Examiner notes that the features of "establishing

preselected nutritional criteria" and "suggesting menu sets in accordance with said preselected

nutritional criteria to said food service professionals" are taught by the applied references (see

Petot; Figure 1, page 1010, paragraph bridging columns 1- 2, page 1011, column 1, paragraphs

2-3); Examiner interprets Petot's teachings of " … [...] ... Add Nutrition Criteria … [...] ...

Output Recommended Menu … [...] ... " (Petot; Figure 1) and " … [...] ... adjust their diet to

reduce energy intake or control specific nutrient content … [...] ... systems meet numeric

constraints, including nutrient minimums and maximums … [...] ..." (Petot; page 1010,

paragraph bridging columns 1- 2) to teach a form of "establishing preselected nutritional

criteria;" and Examiner interprets Petot's teachings of "[n]utrition criteria are added … [...] ..."

and ""[t]he retrieved case is adapted to meet any unmet constraints … [...] ... Nutrient-specific

deficiencies are corrected using adaptation rules" to teach a form of "suggesting menu sets in

accordance with said preselected nutritional criteria to said food service professionals" (Petot;

page 1011, column 1, paragraphs 2-3).

As per Applicant's arguments in the last paragraph on page 11 of the 2 June 2009

response that Kolawa does not teach establishing preselected nutritional criteria and suggesting

menu sets in accordance with said preselected nutritional criteria, as currently claimed in

amended claims 39, 62, and 76, Examiner respectfully notes that it is not the Kolawa reference,

but the Petot reference that has been applied to teach these new limitations.

As per Applicant's arguments on pages 12-13 of the 2 June 2009 response that the

Kolawa reference fails to teach the feature of shaping menu sets of said recipes for each of said

established therapeutic diet types in a menu database in said system based upon said assigned

food attributes, Examiner respectfully notes that Applicant's arguments were persuasive, and

accordingly it is not the Kolawa reference, but the Petot reference that has been applied to teach

these limitations.

As per Applicant's arguments in the paragraph bridging pages 12-13 of the 2 June 2009

that Kolawa fails to teach "assigned food attributes" Examiner respectfully disagrees. Examiner

notes that although the Kolawa reference refers to keeping a database of "chemical components"

that have been assigned to each food menu item, Kolawa points to Figures 26A to 26D, a listing

of vitamins, minerals, and other nutritional components of food menu items as examples of

"chemical components." Kolawa further teaches "… [...] ... parsing an original recipe for its

ingredients. These ingredients are mapped to the chemical components making up the

ingredients" (emphasis added) (Kolawa; column 3, lines 27-31) and Kolawa teaches "the system

then analyzes the chemical components in the specified foods, and assigns values … [...] ..."

(Kolawa; column 16, lines 29-32). Examiner submits that these teachings describe the argued

limitation "assigning various food attributes to said recipes based upon said verified nutritional

values." Moreover, although Kolawa's language is not identical to Applicant's language,

Examiner notes that courts have determined that " … […] … a reference … […] … is prior art for all that it teaches" *(see Beckman Instruments v. LKB Produkter AB*, 892 F.2d 1547, 1551, 13 USPQ2d 1301, 1304 (Fed. Cir. 1989)).

At pages 10-16 of the 2 June 2009 response, Applicant analyzes the applied references separately and argues each of the references individually. In response to Applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See In *re Keller,* 642 F.2d 413, 208 USPQ 871 (CCPA 1981); In *re Merck & Co.,* 800 F.2d 1091, 231USPQ 375 (Fed. Cir. 1986). In addition, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller,* 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

As per Applicant's arguments in pages 13-15 of the 2 June 2009 response that neither Cosentino nor Brown teaches establishing preselected nutritional criteria and suggesting menu sets in accordance with said preselected nutritional criteria to a food service professional, as currently claimed in amended claims 39, 62, and 76, Examiner respectfully notes that it is neither Cosentino nor Brown, but the Petot reference that has been applied to teach these new limitations.

Conclusion

16.   The prior art made of record and not relied upon is considered pertinent to Applicant's

disclosure. The cited but not applied references, Alabaster, U.S. Patent Number 6553386,

Grace et al., U.S. Patent Number 6426077, Mansfield et al., U.S. Patent Number 5819735,

Grana, U.S. Patent Number 6980999, Kuch, U.S. Patent Number 5454721, Yeager , U.S. Patent

Number 6872077, Williams III, U.S. Patent Number5704350, Dennison, U.S. Patent Number

5412560, Matsumori, U.S. Patent Number 6246998, Diaz, et al., U.S. Patent Number 5890128,

Albro et al., U.S. Patent Application Publication Number 20040091843, and the articles teach the

environment of providing customized food menus.

Marling, et al., "A CBR/RBR Hybrid for Designing Nutritional Menus," AAAI Technical

Report SS-98-04, AAAI Spring Symposium on Multimodal Reasoning, Stanford University,

March 1998, pp. 152-156. [Retrieved from Internet 8/28/09]. URL:

<http://www.aaai.org/Papers/Symposia/Spring/1998/SS-98-04/SS98-04-028.pdf >.

Marling, et al., "Integrating CBR and RBR for Nutritional Menu Design,). In Case-Based

Reasoning Integrations: Papers from the 1998 Workshop, 102-107. Menlo Park, Calif.: AAAI

Press. [Retrieved from Internet 8/28/09]. URL:

<http://www.aaai.org/Papers/Workshops/1998/WS-98-15/WS98-15-019.pdf >.

Nutrition Software: 101 Questions to Ask Before you Buy. Today's Dietitian: The Magazine for Nutrition Professionals. February 2000 issue, vol.2 no. 2. [Retrieved from Internet 8/28/09]. URL: <http://www.dietsoftware.com/docs/101.pdf>.

Marling, et al., "Integrating Case-Based and Rule-Based Reasoning to Meet Multiple Design Constraints" Computational Intelligence, 15(3):308–332, 1999. [Retrieved from Internet 8/28/09]. URL: <http://oucsace.cs.ohiou.edu/~marling/cbr_rbr.pdf>.

17.   Any response to this action should be mailed to:

Commissioner of Patents and Trademarks

Washington D.C. 20231

or faxed to: **(571) 273-8300**.

For informal or draft communications, please label

"PROPOSED" or "DRAFT" on the front page of the

communication and do NOT sign the communication.

After Final communications should be labeled "Box AF."

18.   Any inquiry concerning this communication or earlier communications from the examiner should be directed to Natalie A. Pass whose telephone number is (571) 272-6774. The examiner can normally be reached on Monday through Thursday from 9:00 AM to 6:30 PM. The examiner can also be reached on alternate Fridays.

19. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jerry O'Connor can be reached on (571) 272-6787. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

20. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or (571) 272-1000.

/N. A. P./
Examiner, Art Unit 3686
August 29, 2009

/Gerald J. O'Connor/
Supervisory Patent Examiner
Group Art Unit 3686